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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 318

DI GIORGIO FRUIT CORPORATION, a corporation; and DI GIORGIO WINE COMPANY, a corporation,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to United States Court of Appeals for the District of Columbia Circuit

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NATIONAL LABOR RELATIONS BOARD,

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Petition for a Writ of Certiorari to United States Court of Appeals for the District of Columbia Circuit

Di Giorgio Fruit Corporation and Di Giorgio Wine Company pray that a writ of certiorari issue to review, in part, a decision of the United States Court of Appeals for the District of Columbia Circuit issued on June 21, 1951 (R. 191), which affirmed the Board's order dismissing an unfair labor practice complaint as against certain unions. The part of the decision of which review is sought is that part which affirmed the Board's order of dismissal as against Kern County Farm Labor Union, Local 218, National Farm Labor Union, AFL.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 191) is not yet officially reported. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 174) are reported at 87 NLRB 720.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1951 (R. 204). The jurisdiction of this Court is invoked under Section 10(e) of the National Labor Relations Act, as amended, and under 28 USC 1254 (1).

QUESTION PRESENTED

A local union whose membership was comprised exclusively of striking agricultural laborers picketed a farmer's customers and thereby induced employees of the customers to engage in concerted refusals to handle the farmer's products. The question presented is whether the union was a "labor organization" within the meaning of Section 8(b)(4)(A) of the National Labor Relations Act, which makes it unlawful for "a labor organization or its agents" to engage in conduct like that above mentioned.

THE STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 29 USC, Supp. III, 151, et seq.) are set forth in the Appendix. They are Section 8(b)(4)(A), which characterizes as unfair labor practices certain kinds of conduct on the part of "a labor organization or its agents," Section 2(5) which defines a "labor organization" as an organization "in which employees participate" and Section 2(3) which contains definitive provisions relative to the term "employee."

STATEMENT

A consolidated complaint was issued by a regional director of the Board charging four unions with violations of section 8(b)(4)(A) of the Act (R. 1-2). The four unions were Kern County Farm Labor Union, Local 218, National Farm Labor Union, AFL (hereinafter called the *Farm Union*), International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 87 (hereinafter called *Teamsters Local 87*), Distillery, Rectifying and Wine Workers International Union, Local 45 (hereinafter called the *Wine Workers Union*), and Wholesale Delivery Drivers and Salesmen's Union, Local 848, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter called *Teamsters Local 87*).

After hearing, the Board found the Wine Workers Union and Teamsters Local 848 guilty of violating section 8(b)(4)(A) and issued a cease and desist order against them (R. 177-179). This aspect of the case was not reviewed by the court below and review thereof is not sought in this Court.

In the case of Teamsters Local 87, the Board dismissed the complaint upon the ground that the activities of that union were "primary in character." (R. 176). This aspect of the case was reviewed by the court below and the Board's decision affirmed, but review thereof is not sought in this Court.

In the case of Farm Union the Board dismissed the complaint upon the ground that Farm Union was not a "labor organization" or the "agent" of a labor organization (R. 175-176), and this holding was affirmed below by a divided court. We do not seek review in this Court of the question whether Farm Union acted as the "agent" of a labor organization. However, as heretofore indicated, we do seek review of the question whether Farm Union itself was a "labor organization."

The facts, as found by the trial examiner, whose findings were adopted by the Board, may be summarized as follows:

Di Giorgio Fruit Corporation, hereinafter called the "Fruit Corporation," is engaged in growing and selling vegetables and fruits (R. 116). It owns and operates several ranches, among which is one of about 11,000 acres near Bakersfield, California, known as Di Giorgio Farms (R. 116-117).

Di Giorgio Wine Company, hereinafter called the "Wine Company," is a wholly owned subsidiary of the Fruit Corporation (R. 117); it operates a winery located upon land leased from the Fruit Corporation and which is a part of the Di Giorgio Farms property (R. 118).

Shortly prior to October 1, 1947, Farm Union and Teamsters Local 87 demanded of the Fruit Corporation that it bargain collectively with certain units of agricultural laborers in its employ (R. 123). The unit which Farm Union claimed to represent was comprised of harvest and field workers, irrigators, and packing shed workers (R. 122). The unit claimed by Teamsters 87 was comprised of truck drivers and helpers (R. 123).

The Fruit Corporation refused to recognize either union and on October 1, 1947, the two unions established, and they thereafter maintained, joint picket lines about the ranch and winery property (R. 123-124). In addition to maintaining these picket lines, Farm Union engaged in certain activities about to be described and which were alleged in the complaint to constitute unfair labor practices.

The Italian Swiss Colony Incidents

In the late afternoon of Thursday, February 26, 1948, a shipment of wine from Di Giorgio (i.e., from the Wine Company) to Italian Swiss Colony arrived by tank car at the latter's Clovis plant (R. 138). The Farm Union thereupon established a picket line at the plant, and the next morning the employees of Italian Swiss Colony refused to cross the picket line to report for work (R. 138). The car thereafter was unloaded by supervisory personnel and the pickets departed (R. 138).

On March 4, 1948, twelve more tanks cars of wine from Di Giorgio arrived at the Italian Swiss Colony plant (R. 139). Again, the Farm Union established a picket line at the plant (R. 139). Italian Swiss Colony employees refused to work behind the picket line and walked out (R. 139). The picket line was maintained, and Italian Swiss Colony employees remained away from work, through March 10 (R. 140). Most of the wine having then been unloaded by supervisory employees the pickets left and on the morning of March 11, the Italian Swiss Colony employees returned to work (R. 140).

In the foregoing incidents, the Farm Union had the cooperation of the Wine Workers Union, which represented Italian Swiss Colony employees and which instructed them not to work behind the picket line (R. 138-139).

The Safeway Stores Incident

On April 29, 1948, two truckloads of potatoes left Di Giorgio Farms for Safeway's distribution warehouse at Los Angeles (R. 141). The trucks, which were owned and operated by independent trucking concerns, were followed to Los Angeles by three representatives of Farm Union (R. 141). Upon arrival of the trucks at the Safeway warehouse, one of the Farm Union representatives spoke to a Safeway supervisory employee, asked that the potatoes not be unloaded and threatened a picket line if unloading should proceed (R. 141). He repeated his threat to the supervisory employee's superior over the telephone (R. 142). When employees of one of the truckers started unloading potatoes, picketing was commenced and drivers employed by Safeway then refused to drive their trucks through the picket line (R. 142-143). This state of affairs continued for about two hours until the employees of the independent trucker started reloading the potatoes on the truck for the purpose of removing them from the premises (R. 143). The pickets were then withdrawn, and the Safeway drivers resumed their work (R. 143).

In the foregoing affair the Farm Union had the cooperation of Teamsters Local 848, which represented the Safeway drivers and which took the position that Safeway drivers would not drive their trucks from the warehouse premises until the potatoes were removed (R. 142-143).

Farm Union's Membership

While the membership of Farm Union was open, not only to agricultural laborers, but also to "allied workers" such as commercial packing house employees (R. 121), it had not yet gotten around to organizing anyone other than Di Giorgio employees and at the time of the above mentioned incidents at Italian Swiss Colony and Safeway Stores, Inc. its membership was comprised exclusively of Di Giorgio's striking agricultural workers (R. 121).

The Board's Decision

Upon the basis of the foregoing facts, the Board held both the Wine Workers Union and Teamsters Local 848 guilty of violating section 8(b)(4)(A) of the Act—the Wine Workers Union because of its participation in the Italian Swiss Colony incidents (R. 160, 176) and Teamsters Local 848 because of its participation in the Safeway incident (R. 161, 176)—and a cease and desist order was issued against them (R. 177, 178).

However, Farm Union was let off. The complaint was dismissed as to it (R. 179), upon the ground that it was not a labor organization or the agent of a labor organization (R. 175-176), and it therefore is free under the decision to continue instigation of secondary strikes and boycotts aimed at Di Giorgio.

It has been and is our position, in support of which we rely on this Court's decision in *Phelps-Dodge Corporation v. National Labor Relations Board,* 313 U.S. 117, that section 2(5) of the Act, in defining a labor organization as an organization "in which employees participate," uses the term "employees" in its

generic sense; and that although by reason of section 2(3) an "individual employed as an agricultural laborer" is not to be considered an "employee" in relation to that employment, he nevertheless is an employee in relation to other potential employments and hence is an employee in the generic sense in which the term "employees" is used in defining "labor organization."

The Board tacitly rejected the foregoing reasoning and adopted (R. 175) the following finding of the trial examiner (R. 121):

> "Kern County Farm Labor Union, Local 218, affiliated with National Farm Labor Union A. F. of L., is an organization which was formed for the purpose of representing farm and allied workers in matters of collective bargaining. Its membership is composed exclusively of persons employed by Fruit Corporation as agricultural laborers and, for reasons which appear below, it is not a labor organization within the meaning of the Act."

The reasoning to which the foregoing finding referred as appearing "below" was that section 2(5) of the Act defines a labor organization as one "in which employees participate," that section 2(3) provides that the term "employee" does not include "any individual employed as an agricultural laborer," and that a local union comprised exclusively of agricultural laborers therefore is not a labor organization (R. 145-146).

In contrast, while holding that Teamsters Local 87 had not violated the Act because it had been guilty only of "primary" activities, the Board held that it was a "labor organization" because in addition to Di Giorgio's agricultural laborers "it also numbers among its members employees of other employers in Southern California" (R. 176).

Decision of the Court of Appeals

The Court of Appeals, in a two to one decision, affirmed the Board. The majority of the Court held (R. 193):

> "* * * according to the language of the Act 'employees' must participate in an organization if it is to be deemed a labor organization within the meaning of the statute, and agricultural laborers are not included within the statutory term 'employees.' Hence, so far as the words of the statute are concerned the Farm Union, being composed exclusively of agricultural laborers, is not a labor organization within the meaning of the statute, and so a secondary boycott by the Farm Union would not fall within the prohibitions of the statute."

In the foregoing connection, the majority held that the provision in section 2(3) of the Act that the term "employee * * * shall not include any individual employed as an agricultural laborer" is a "specific delimiting provision" which qualifies the term "employee" wherever and however used in the Act (R. 195). The majority distinguished this Court's decision in the *Phelps-Dodge* case upon the ground that this Court was not there confronted with any such "specific delimiting provision" and also upon the ground that this Court there was dealing with two different sections of the Act rather than with "two paragraphs in the same section." (R. 195-196).

Regarding the Congressional intent as revealed by the legislative history of section 8(b)(4)(A), the majority conceded that "Congress was undoubtedly concerned with the plight in which secondary boycotts place farmers; and it effectively protected farmers from the sort of boycotts which it then had in mind, boycotts by teamsters, unloaders, etc."; but that the terms of the statute did not go so as to protect farmers against such activities upon the part of farm labor unions, and that it was not a proper function of the court to speculate as to what Congress would have done if it had "noted" the latter problem (R. 197).

Judge Miller dissented (R. 200). In respect to the question whether Farm Union was a labor organization, he stated simply (R. 200):

> "I think, for the reasons advanced in argument by the Petitioner and *amici curiae*—which are summarized in the majority opinion—that the Farm Union should be regarded as the type of union to which the Act applies."

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

1. In failing to hold that the definitive provisions of section 2(3) of the Act relative to the term "employee" contemplate use of that term in more than one sense, including the generic; and that the exclusions set forth in that section do not mean that the individuals mentioned are to be considered non-employees in every relationship and for every purpose;

2. In failing to hold that section 2(5) of the Act, in defining a "labor organization" as one in which "employees" participate, uses the term "employees" in its generic sense;

3. In failing to hold that while an individual employed as an agricultural laborer is not to be considered an "employee" in relation to that employment, he nevertheless is an "employee" in relation to other, non-exempt, employments and is therefore an employee in the generic sense in which the term "employees" is used in section 2(5)'s definition of a "labor organization";

4. In holding that Congress in enacting section 8(b)(4)(A) of the Act intended to protect farmers against inducement of a refusal by industrial or commercial employees to handle his products only to the extent that a non-agricultural union is responsible for such inducement, and that it did not intend to protect him against inducement of such a refusal by the farm labor union primarily involved;

5 In holding that Farm Union was not a "labor organization" within the meaning of section 8(b)(4)(A).

REASONS FOR ALLOWANCE OF THE WRIT

The reasons why the Writ should be allowed are the following: (1) The question heretofore stated is one of general importance, and one of substance relating to the construction of a statute of the United States, which has not, but should be, settled by this Court; (2) The decision below is in conflict with the decision of this Court in *Phelps-Dodge Corporation v. National Labor Relations Board*, 313 U.S. 177; and (3) the decision below is in conflict with a prior decision of the Court of Appeals of the Fifth Circuit. More particularly:

I. The Question Is One of General Importance, and One of Substance Relating to the Construction of a Statute of the United States, Which Has Not, but Should Be, Settled by This Court.

The question whether a union of agricultural laborers or other individuals engaged in excluded employments is a "labor organization" within the meaning of the Act is one upon which this Court has never passed. Nor, excepting for the Court of Appeals in the instant case, has any other court passed upon that question.[1]

Nevertheless, the question is one which is presented frequently in the administration of the Act, particularly since enactment of the 1947 amendments.[2] It is a question upon which General

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[1]In *National Labor Relations Board v. Edward G. Budd Mfg. Co.* (C.C.A. 6th), 169 F.(2d) 571, cert. den. 335 U.S. 908, it was contended that the Foreman's Association of America was not a "labor organization" because "supervisors are not employees under the Labor Management Relations Act." The court disposed of this contention with the statement that the Association "admits to membership persons who are not supervisors but who are employees within the meaning of the amended Act" (169 F.(2d) at 576); the court did not pass upon the question which would have been presented had the membership of the Association been limited to supervisors.

[2]See, e.g., *Matter of John Hancock Mutual Life Insurance Co.*, 92 N.L.R.B. No. 27, some aspects of which were reviewed in *John Hancock Mutual Life Insurance Co. v. National Labor Relations Board* (C.A.D.C.), decided July 5, 1951, and not yet officially reported.

Counsel and the Board disagreed in the instant case and upon which the court below likewise was divided. Indeed, the Board itself has since evidenced doubt as to the soundness of its position.[3] A controlling determination of the question is essential to orderly and proper administration of the Act, is of vital importance to farmers and other employers dealing with employees in excluded employments, and is of concern to Congress in its evaluation of the effect of the 1947 amendments of the Act and of the need for further amendment.

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[3]In *Matter of John Hancock Mutual Life Insurance Company*, supra note 2, an employer refused employment in a non-supervisor position to a man who formerly had been employed as a supervisor, had been active in organizing a supervisors' union, and had testified for the union in an abortive representation proceeding. The employer was charged with violating section 8(a)(4) of the Act upon the ground that he had discriminated against the man because the latter had testified in the representation proceedings, and with violating section 8(a)(3) upon the ground that by refusing the man employment he had discouraged membership in a "labor organization." The trial examiner found the employer guilty of violating section 8(a)(4), but in respect to section 8(a)(3) found as follows:

> "The General Counsel's contention that the refusal to hire also constituted violation of Section 8(a)(3) of the Act is also rejected. The Union is not a labor organization within the meaning of the Act since its membership is confined to supervisors of the Respondent. Accordingly, it could not be found that the Respondent failed and refused to hire Kohen in order to discourage membership in a *labor organization*."

The Board declined to adopt the foregoing finding and conclusion, with the following explanation:

> "As the policies of the Act will as well be effectuated by a remedial order based upon a limited finding that the Respondent in this case violated Section 8(a)(4) of the Act, we find it unnecessary to determine whether or not the refusal to hire Kohen also violated Section 8(a)(3). Accordingly, we do not adopt the Trial Examiner's findings and recommendation respecting the 8(a)(3) allegation, but we shall, nevertheless, dismiss the complaint to that extent."

There was no doubt that the membership of the union was confined to supervisors. The Board's reluctance to adopt the trial examiner's conclusion that it was not a labor organization can be ascribed only to doubt on the part of the Board as to the validity of the position which it had taken in the present case.

IMPORTANCE IN THE ADMINISTRATION OF THE ACT

As heretofore noted, the Board and the majority of the court below, held that Farm Union was not a labor organization because its membership was comprised exclusively of individuals employed as agricultural laborers (or, to be more accurate, individuals who had been working as agricultural laborers, but who were on strike). In contrast, the Board held that Teamsters Local 87 was a labor organization because its membership also included employees of commercial trucking concerns. Under the Board's reasoning, if two of the Farm Union's striking members had secured jobs in a commercial packing house, Farm Union would thereupon have become a "labor organization" and its conduct in inducing secondary boycotts of Di Giorgio would have become unlawful. If the two workers had then lost their jobs in the commercial packing house, Farm Union then would have ceased to be a labor organization and its conduct would have reverted to legality. The lawfulness of Farm Union's conduct thus was made to depend upon a factor in no way germane to the policy which section 8(b)(4)(A) was designed to effectuate.

The Board's reasoning, while applied in the instant case to a union of agricultural laborers, would apply as well to a union of supervisors, railroad employees, or other individuals engaged in excluded employments.[4]

And while we are concerned in the instant case only with an alleged violation of section 8(b)(4)(A), the same reasoning would apply as well to all of the other subdivisions of Section 8(b), for the various types of conduct specified in the several subdivisions of that section are forbidden only to a "labor organization or its agents."[5] In short, under the Board's decision any

[4]Section 2(3) not only excludes agricultural laborers from the meaning of the term "employer" but also excludes, in substantially the same terms, supervisors, railroad workers and various other categories.

[5]The same reasoning also would apply to section 303 of the Labor Management Relations Act, 1947 (Title 29 U.S.C. sec. 187) for its

union of individuals in excluded employments is free to interfere in protected employment relationships in any or all of the ways forbidden to other unions by section 8(b).[6]

Nor is the impact of the decision below limited to section 8(b). Affected also are various other provisions of the Act which use the term "labor organization."[7] And also affected are the several provisions which use the term "employee" or "employees,"[8] for

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language is identical in all material aspects with that of section 8(b) and the term "labor organization" as used therein has the same statutory meaning (Title 29 U.S.C. sec. 158).

[6]Thus, although section 8(b)(1) renders it an unfair labor practice for a "labor organization * * * to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7," Farm Union would have been free under the Board's decision to commit physical violence upon Italian Swiss Colony employees who persisted in working behind the picket line.

Section 8(b)(2) renders it an unfair labor practice for a "labor organization * * * to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)." Under the Board's decision, Farm Union would nevertheless be free to picket a commercial packing house on behalf of an affiliated local to force the packing house to hire only members of the affiliated local and to discharge non-members.

The foregoing examples suffice for purposes of illustration.

The majority of the court below stated that the substance of most of the restrictions contained in section 8(b) is such that they cannot be applied to a union of farm laborers or other persons in excluded employments without nullifying the exclusions. This statement ignores the fact, which is demonstrated by the present case and by the other examples above set forth, that the activities of a union whose membership is comprised exclusively of individuals in excluded employments are not necessarily directed at such individuals only, but may be (as they were in the present case) directed at other employees and at employment relationships having the full protection of the Act.

It is true that under the Act Farm Union may with impunity interfere in agricultural employment rights and relationships (as, for example, by forcing a farmer to discharge an agricultural laborer because he is not a union member). But this is not because of any special license granted a farm labor union, but because agricultural employment rights and relationships are not protected by the Act; a teamsters union or any other union would have the same license.

[7]See secs. 8(a)(1), 8(a)(3), 9(b), 9(c), 9(e), 9(f), 9(g), 9(h), 10(c), 10(l), 14(a), 14(b).

[8]See secs. 7, 8(a)(2), 8(a)(3), 8(a)(4), 8(a)(5), 9(a), 9(b), 9(c), 9(e), 9(f), 9(g), 9(h), 10(c), 10(l), 14(a); and see *International Rice Milling Co. v. National Labor Relations Board* (C.A. 5th), 83 F.(2d) 21, discussed infra, page 24.

the very basis of the decision is that individuals employed as agricultural laborers or in other excluded employments are not to be considered "employees" in any sense or for any purpose. To illustrate:

In *Phelps-Dodge Corporation v. National Labor Relations Board*, 313 U.S. 117, this Court held that an individual on strike who had obtained "regular and substantially equivalent employment" elsewhere[9] nevertheless was an "employee" within the meaning of the provision in Section 10(c) empowering the Board to order reinstatement of "employees." Suppose that the other employment which the individual in question had obtained was employment as an agricultural laborer. Under the reasoning of the Board in the present case, this Court would have been compelled to hold that the individual in question thereby was deprived of his status as an employee within the meaning of Section 10(c).

Suppose that some of Di Giorgio's striking agricultural laborers had applied for a job in a commercial packing house and had been refused employment because of their membership in Farm Union or in the Teamsters' Union. Under the Board's reasoning the packing house operator would not have been guilty of the unfair labor practice of interfering with "employees" in the exercise of their right of self-organization (see sec. 8(a)(1)) because striking agricultural laborers are not "employees." Nor, in the case of those individuals who were members of Farm Union, would the packing house operator have been guilty of the unfair labor practice of discouraging membership in a "labor organization" by "discrimination in regard to hire" (see sec. 8(a)(3)) because Farm Union was not a labor organization. True, the individuals

[9]Section 2(3) impliedly excludes from the meaning of the term employee "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice" and who has obtained "other regular and substantially equivalent employment." For discussion of the *Phelps-Dodge* case, see page 19, infra.

in question were potential packing house employees, but the Board holds that until and unless some of them actually secure packing house jobs they are agricultural laborers, that they therefore are not "employees" in any sense of that term and their union, if it currently has no members other than agricultural laborers, is not a "labor organization."

Suppose that this same commercial packing house operator, being desirous of insuring that none of his existing employees would join the Farm Union, were to threaten to discharge any of them who did so. According to the Board's decision, he nevertheless would not be guilty of the unfair labor practice of coercing his employees in the exercise of their right to join a "labor organization" (see sec. 8(a)(1); sec. 7) because the Farm Union, being comprised at the moment of agricultural laborers, is not a "labor organization."

The basic error of the decision below lies in its misconstruction of the definitive provisions of section 2(3) relative to the term "employee." More particularly the error lies in treating the exclusory provisions of that section as if they were intended to exclude *individuals* from the coverage of the Act, rather than *employments*. The wording of the exclusory provisions may be inept, but it nevertheless is clear that Congress did not intend to say that an individuals' current status as an agricultural, railroad or domestic worker excludes him in all respects and in all relationships from the benefits and restrictions of the Act. Congress did not intend to exclude the individual from the coverage of the Act, but intended only to exclude the employment. In the words of the Senate Committee Report (Report No. 1184, 73d Congress, 2d Session, p. 1) on Senate bill 2926, the effect of the exclusion here in question was that "the bill does not relate to employment * * * as an agricultural laborer."

The true meaning of the Act is that *no* individual has any rights thereunder in respect to employment in agricultural labor or other

excluded employments. On the other hand, an individual employed as an agricultural laborer has the same rights as any other individual in respect to non-excluded employments. If a truck driver employed by a commercial trucking concern were to apply for a job driving a truck as an agricultural laborer on a farm and were to be rejected because of his membership in the Teamsters' Union, he and his union would be without recourse under the Act. On the other hand, if an individual employed as an agricultural laborer were to apply for a job driving a truck for a commercial trucking concern and were to be rejected because of his union membership, he would be entitled to the full protection of the Act.

In short, the provision in section 2(3) that the term "employee * * * shall not include any individual employed as an agricultural laborer" does not mean that such an individual is without status as an "employee" in relation to covered employments but means simply that no individual is to be considered an "employee" in relation to agricultural labor. An individual employed as an agricultural laborer is not an "employee" in relation to that employment, but he is an "employee" in relation to other employments (he is a member of the potential working force of industry generally) and hence is an employee in the generic sense in which the term "employees" is used in defining a labor organization. In holding otherwise, the Board and the majority of the court below committed a basic error affecting the interpretation and administration of numerous provisions of the Act.

IMPORTANCE TO AGRICULTURE

The farmer, due to the perishable nature of his products is peculiarly vulnerable to secondary boycotts. He has been one of their most frequent victims and, indeed, probably has been *the* most frequent victim of the product boycott. In this connection we need refer only to the Congressional debates on the 1947

amendments, for they were replete with illustrations of secondary boycotts directed against farmers.[10] Indeed the farmer's need for relief was one of the main considerations mentioned in support of the enactment of sections 8(b)(4)(A) and (B) and of the sister provision in section 303 of the Labor Management Relations Act (Title 29 U.S.C. sec. 187) permitting recovery of damages.[11] It is patent, therefore, that the question of how far the Act goes in affording the farmer protection is one of great importance to him. It also, of course, is a question of importance to farm labor unions.

Under the decision below, the farmer has the protection of the Act only as against a union of commercial or industrial employees which happens to become involved in the boycott. No protection is afforded against the farm union primarily involved and which is responsible for inducing the boycott unless it happens to have some members working in covered employments; it is free under the decision below to continue its picketing and

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[10]See Cong. Rec. 3424, 3432.

[11]Section 303 was enacted as a result of amendments to Senate Bill 1126 proposed in a supplemental committee report and on the floor of the Senate. Referring to secondary boycotts and jurisdictional strikes, the supplemental report said that "it is the small employer * * * and the farmer or farm trucker who are the main victims of this type of racketeering union activity" (Sen. Comm. Rep. No. 105, Supplemental Views, 80th Cong. 1st Sess., p. 54). In explaining the amendment on the Senate Floor, Senator Ball stated (93 Cong. Rec. 4838):

> "As I said before, farm producers and small businesses and their employees are the main victims of secondary boycotts, jurisdictional strikes, and organizational boycotts * * *. It is such persons and their rights that we are trying to protect."

The amendment as originally proposed and a substitute amendment later offered by Senator Taft (93 Cong Rec. 4838) did not refer to "labor organization" but prohibited "any person" from engaging in the outlawed conduct and hence clearly would not have permitted a farm union to escape liability on the ground that it was not a "labor organization." Thereafter the term "labor organization" was substituted for "person" for the sole purpose of avoiding imposition of liability on individual employees (93 Cong. Rec. 4843). These facts are recited in somewhat more detail in the opinion of the court below (R. 194).

other methods of instigation whenever and wherever it can follow or locate the farmer's products.

In the present case, for example, if Di Giorgio had been unable to show that the Wine Workers Union and Teamsters Local 348 committed overt acts in aid of Farm Union, Di Giorgio would have been entirely without remedy. Even as it was Di Giorgio could secure relief against those two unions only after the damage in each instance had been done, and Farm Union was and is free to continue picketing at Italian Swiss Colony, Safeway Stores, or any other customer's place of business. Such picketing may be, and usually is, entirely effective even without overt help from any other union.

IMPORTANCE TO CONGRESS

The court below said that "Congress was undoubtedly concerned with the plight in which secondary boycotts place farmers; and it effectively protected farmers from the sort of boycotts which it then had in mind, boycotts by teamsters, unloaders, etc." (R. 197.) However, the court stated in substance that the terms of the statute did not protect farmers against such activities on the part of farm unions and that it was not the court's function to speculate as to what Congress would have done about it "if Congress had noted the problem"[12] (R. 197).

[12]We do not agree that Congress did not have in mind secondary activities of farm unions in support of their efforts to organize agricultural laborers, or that Congress did not intend to protect farmers from such activities. Senator Ball, in offering the amendment which resulted in enactment of section 303, stressed the farmer's need for protection against "organizational boycotts" (see note 11 supra). When Congress enacted section 303 with wording identical in its material aspects to that of section 8(b)(4), it undoubtedly thought that it was giving the farmer such protection. Thus, when Senator Aiken sought to enlarge section 303 to allow farmers injunctive as well as monetary relief (93 Cong. Rec. 4860), Senator Pepper, referring to section 8(b)(4) and to the provisions of section 10(1) relative to injunctive relief at the instance of the Board, said that "the matter is not left without remedy in the main bill itself" (93 Cong. Rec. 4862); and Senator Morse, referring to the same provisions, said that "farmers are going to find that, without regard to class legislation, a measure has been passed providing a procedure that will give them the remedies they need" (93 Cong. Rec. 4863).

If the decision below is correct, then Congress almost wholly failed of its admitted purpose of protecting farmers from "boycotts by teamsters, loaders, etc." Such a boycott—that is, a refusal by teamsters, loaders, or other commercial or industrial employees to handle the farmer's products—invariably is instigated by the union representing or seeking to organize the farmer's employees. As we have already noted, if the farmer is without remedy against that union, then he is without any effective remedy whatever, and the court below was wrong in saying that the Act affords farmers effective protection against such boycotts.

The fact is, therefore, that if the decision below is correct, Congress almost wholly failed in its effort to afford farmers protection against secondary boycotts. The matter plainly is one of concern to Congress.

II. The Decision Below Is in Conflict with the Decision of This Court in Phelps-Dodge Corporation v. National Labor Relations Board.

In *Phelps-Dodge Corporation v. National Labor Relations Board*, 313 U.S. 177, this Court had before it a question as to the power of the Board to reinstate a striking employee who had obtained "other regular and substantially equivalent employment." Section 10(c) of the Act provides for re-instatement of "employees." Section 2(3) of the Act impliedly excludes from the meaning of the term "employee" a striking employee who has obtained "othher regular and substantially equivalent employment." The employer argued that by reason of this implied exclusion, the individual in question was not an employee within the meaning of section 10(c). This Court held otherwise, characterizing the employer's argument as "a bit of verbal logic from which the meaning of things has evaporated." (313 U.S. at 191).

In stating the problem, the Court, speaking of the provisions of section 2(3) and section 10(c), said (313 U.S. at 190):

> "Merely as a matter of textual reading these Provisions in combination permit three possible constructions: (1) a

curtailment of the powers of the Board to take affirmative action by reading into § 10(c) the restrictive phrase of § 2(3) regarding a worker 'who has not obtained any other regular and substantially equivalent employment'; (2) a completely distributive reading of § 10(c) and § 2(3), whereby the factor of 'regular and substantially equivalent employment' in no way limits the Board's usual power to require employment to be offered a worker who has lost employment because of discrimination; (3) an avoidance of this either-or reading of the statute by pursuing the central clue to the Board's powers—effectuation of the policies of the Act—and in that light appraising the relevance of a worker's having obtained 'substantially equivalent employment.' "

The Court held that the third alternative course was the proper one.

Regarding the term "employees" in § 10(c), the Court said (313 U.S. at 191):

> "* * * insofar as any argument is to be drawn from the reference to 'employees' in § 10(c), it must be noted that the reference is to 'employees', unqualified and undifferentiated. To circumscribe the general class 'employees', we must find authority either in the policy of the Act or in some specific delimiting provision of it."

The Court then held that neither § 2(3) nor any other provision of the Act contained "a comprehensive definition of 'employee' restrictive of § 10(c)." (303 U.S. at 191). On the contrary, the Court pointed out, § 2(3) begins with a provision that the "term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise * * *." The Court held that the implied exclusion of workers who have obtained "regular and substantially equivalent employment," while it qualifies the term "employee" as used at some points in the Act, does not qualify that term as used to designate the general class. In the words of the Court (313 U.S. at 192):

"The reference in § 2(3) to workers who have 'obtained regular and substantially equivalent employment' has a role consonant with some purposes of the Act but not one destructive of the broad definition of 'employee' with which § 2(3) begins."

Turning now to the present case, the reference to "employees" in section 2(5)'s definition of a labor organization, like the reference to "employees" in section 10(c), is "unqualified and undifferentiated." Furthermore, the wording of section 2(5) makes a far stronger case than even the wording of section 10(c) for the proposition that the term "employees" was intended to embrace "the general class." Section 10(c), in speaking of "reinstatement of employees," seems to contemplate a preexisting employment relationship and thus furnishes basis for argument that it uses the term "employee" in the narrow sense of an individual having a job with the particular employer involved. In contrast, section 2(5) contains no such basis for a restrictive construction. In speaking of an organization "in which employees participate," section 2(5) does not speak of individuals in relation to a particular employer or employment, but speaks clearly of the general class. That it was the general class that was meant is confirmed by a legislative history which shows that the definition of "labor organization" was intended to be all-embracing.[13]

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[13]The original bills referred to a "labor organization" as one "in which employees" participate but defined "employee" without any exclusion of agricultural laborers (S. 2926, 73d Cong. 2d Sess., pp. 3-4; 14 R. 8423, 73d Cong. 2d Sess., pp. 3-4); the wording of the bills therefore would not have permitted of the contention that a farm union is not a "labor organization." The subsequent history of the definition of "labor organization" was one of progressive enlargement to assure that it would cover not only all unions but also employee representation plans. See, e.g., S. 2926, as reported, 2d Senate print, p. 25; S. 1958, 74th Cong. 1st Sess., p. 3; S. 1958 as reported, 2d Senate print, p. 4.

As for the definition of the term "employee," the exclusion of "any individual employed as an agricultural laborer" was added by an amendment of the original Senate bill made in committee (S. 2926, as reported, 2d Senate print, p. 25), the effect of the amendment being that "the bill

Notwithstanding the foregoing, the majority of the court below held that section 2(5) uses the term "employees" in a restrictive sense which does not include individuals currently employed as agricultural laborers. This holding was based upon the ground that the reference to such individuals in section 2(3) is a "specific delimiting provision" which qualifies the term "employee" wherever and however used in the Act, and that an individual currently employed as an agricultural laborer therefore cannot be considered an "employee" for any purpose. In so holding, the majority endeavored to distinguished *Phelps-Dodge* on two grounds:

(1) First, it said in substance that the *Phelps-Dodge* case did not involve a "specific delimiting provision" like the exclusion in section 2(3) of "any individual employed as an agricultural laborer." The fact is that the *Phelps-Dodge* case likewise involved an exclusion in section 2(3) and that the exclusion therein involved, while expressed in a backhanded way, was just as specific and just as delimiting as the exclusion of individuals employed as agricultural laborers. This Court plainly held that such an exclusion does not qualify the term "employee" wherever and however used in the Act but that the question whether a particular provision of the Act uses the term "employee" in a general or a qualified sense is to be determined from the context and purpose of that provision.

2. Second, the court below considered it a significant difference that the *Phelps-Dodge* case involved "two different sections dealing with different topics" (i.e., sections 2(3) and 10(c)), whereas the present case involves "two paragraphs of the same section" (i.e. subsections 3 and 5 of section 2). But subsections 2(3) and 2(5) deal with different topics, just as do subsections

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does not relate to employment * * * as an agricultural laborer" (Sen. Comm. Rep. 1184, 73d Cong. 2d Sess., p. 1). There was no suggestion that by excluding agricultural employment from coverage it was intended to alter the concept of a labor organization as elsewhere defined.

2(3) and 10(c). As for the relative physical locations of the several provisions, subsection 2(5) was placed in the same section as subsection 2(3) for the obvious reason that both provisions are of a definitive nature, and not for the purpose of giving the term "employees" a different meaning in subsection 2(5) than in other sections of the Act.

The conflict between the decision below and this Court's decision in *Phelps-Dodge* is pointed up by reference once again to a hypothesis mentioned before. Suppose that in *Phelps-Dodge* the other employment obtained by the employee there in question had been employment as an agricultural laborer. We do not think that this difference from the facts as they actually existed would have been regarded by the Court as material. We do not think that the individual's current employment as an agricultural laborer would have deprived him of status as an "employee" under section 10(c). We think that this Court would have held that the individual in question, while not to be considered an employee in relation to employment as an agricultural laborer, was nevertheless an employee in relation to other potential employments and hence was a member of the "general class" to which section 10(c) refers.

By the same token, we submit that the fact that an individual is currently employed as an agricultural laborer does not deprive him of his status as a member of the general class to which section 2(5) refers by its use without qualification or differentiation of the term "employees." We submit that there is no significant difference between the *Phelps-Dodge* case and the present and that the decision below conflicts with this Court's decision in *Phelps-Dodge*.

III. The Decision Below Conflicts with a Prior Decision of the Court of Appeals of the Fifth Circuit.

There remains to be considered a decision of the Court of Appeals of the Fifth Circuit with which, we submit, the decision below is in conflict.

In *International Rice Milling Co. v. National Labor Relations Board*, 183 F.(2d) 21, a union picketing a rice mill in an effort to gain recognition induced railroad employees to engage in a concerted refusal to take railroad cars past the picket line. It will be recalled that section 8(b)(4)(A) renders it an unfair labor practice for a labor organization or its agents to induce "the employees of any employer" to engage in a strike or concerted refusal to perform services, etc. The railroad and its employees were subject to the Railway Labor Act and by the terms of section 2 of the National Labor Relations Act were excluded, respectively, from the meaning of the terms "employer" and "employee."[14] The court nevertheless found the union guilty of inducing a work stoppage by "employees" of an "employer" in violation of section 8(b)(4)(A), holding that those terms are used generically in that section and embrace a railroad and its employees notwithstanding the exclusions in section 2. That decision and the decision below thus are in square conflict upon the question whether those exclusions control the term "employee" wherever used and in whatever sense, or whether they permit use of the term "employees" at some points to embrace individuals engaged in excluded employments.

Another aspect of the foregoing case was reviewed by this Court in *National Labor Relations Board v. International Rice Milling Company, Inc.*, 341 U.S. 665. The Board, however, did not seek review of the above holding, but permitted it to stand unchallenged.[15]

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[14]Section 2(2) provides that the term "employer" shall not include "any person subject to the Railway Labor Act," and section 2(3) provides that the term "employee" shall not include "any individual employed by an employer subject to the Railway Labor Act."

[15]The Board's petition to this Court for certiorari stated in a footnote on page 2:

> "In addition to picketing in the vicinity of the plant of Kaplan, the employer involved in this dispute, the Union also picketed certain railroads in an effort to force them to cease transporting prod-

We do not mean to imply that we are satisfied that the court was correct in holding that inducement of railroad employees to refuse to perform services for their employer constituted a violation of section 8(b)(4)(A). It is strongly arguable that in relation to their railroad employment, the railroad workers were not statutory "employees" and that the union's interference with that exempted employment relationship did not constitute inducement of a refusal to perform services by "employees."[16] Whether the decision was right or wrong, however, a comparative analysis of that decision and the present demonstrates the need for a controlling determination by this Court of the effect upon section 8(b)(4) of the definitive provisions here under consideration.

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ucts to Kaplan and other rice mills. The court below, reversing the Board, held that by picketing the railroads the Union violated Sections 8(b)(4)(A) and (B). The Board does not seek review of the holding of the court below on this point."

[16]The provision of section 2(3) excluding railroad workers from the meaning of the term "employee" was added by the 1947 amendments and was explained in the Senate Report as follows (Sen. Rep. No. 105, 80th Cong., 1st Sess., p. 19):

> "The exemption of employees of employers subject to the Railway Labor Act is to make it perfectly clear that in providing remedies for unfair labor practices of unions and their agents it was not intended to include such employees."

As noted by the court below (R. 196), the Board argues from the foregoing that it was the Congressional intent to permit railroad unions (and, by analogy, farm unions) to interfere in employment relationships protected by the National Labor Relations Act, as, for example, by inducing a secondary strike by factory employees. This was not in fact the Congressional intent. The intent was, not to immunize railroad unions from liability for interference with employment rights and relationships governed by the National Labor Relations Act, but to make it plain that *railroad* employment rights and relationships were to be left as in the past to the Railway Labor Act. As explained by Senator Taft (93 Cong Rec. 6498):

> "I want to point out that railway labor has never been covered by the Wagner Act; it has always been covered by the Railway Labor Act * * *. We saw no reason to change that situation."

CONCLUSION

The question to which we have referred is one of general importance and of substance relating to the construction of the National Labor Relations Act. The rationale of the decision below is in conflict with the decision of this Court in *Phelps-Dodge Corporation v. National Labor Relations Board*, supra, and with the decision of the Court of Appeals of the Fifth Circuit in *International Rice Milling Company, Inc. v. National Labor Relations Board, supra.* For these reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Dated: San Francisco, California.
September 7, 1951.

(Appendix follows)